IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL NO. 1109 OF 1999
With
CRIMINAL APPEAL NO. 1225 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE R.H.SHUKLA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge ?

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RAJESH @ RAJU RAMRAJ PASI & ANR. - Appellant(s)
Versus
STATE OF GUJARAT - Respondent(s)

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Appearance :
Ms. Sadhana Sagar, Advocate appointed by the Legal Aid Committee for both the Appellants.
Mr. R. C. Kodekar, Addtl. Public Prosecutor for Respondent(s).

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA
and
HONOURABLE MR.JUSTICE R.H.SHUKLA

Date : 12/12/2007

COMMON ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. Challenge in these two criminal appeals filed under Section 374 of the Code of Criminal Procedure ('the Code' for short) is to the correctness of the judgment and order dated 01.10.1999 rendered in Sessions Case No. 37 of 1999 by the learned Additional Sessions Judge, Ahmedabad (Rural) at Mirzapur, by which the appellants of both these appeals i. e. original accused Nos.1 and 3 ('A1 and A3' for short) have been convicted for commission of the offences punishable under Sections 394, 302 read with Section 34, and Sections 449 and 452 of the Indian Penal Code ('IPC' for short) and both of them have been sentenced to suffer imprisonment for life and fine of Rs.100/-, in default rigorous imprisonment of one month for the offence punishable under Section 302 read with Section 34 IPC, rigorous imprisonment for five years and fine of Rs.100/-, in default rigorous imprisonment of one month for the offence punishable under Section 394 read with Section 34 IPC, rigorous imprisonment for two years and fine of Rs.100/-, in default rigorous imprisonment of one month for the offence punishable under Section 449 IPC and rigorous imprisonment for one year and fine of Rs.100/-, in default rigorous imprisonment of one month for the offence punishable under Section 452 IPC. It is also ordered that all the substantial sentences shall run concurrently.

2. The prosecution case, as disclosed from the FIR and unfolded during the trial, is as under:

2.1 In the complaint lodged by Shrikant Chandulal Shah – PW20, who is son in law of the deceased Bhadraben, it is, *inter alia,* alleged that on 24th January, 1998 at about 5:00 p.m., he received a telephone call from his wife - Smitaben regarding the fact that the servant of her mother came to the house and informed her that the house of Bhadraben is closed for last two days and is locked from outside. The servant also informed that he has come to inquire about the same. Smitaben asked the complainant to come to the house. Accordingly, the complainant came to his house at about 6:00 p.m. and thereafter, went to the house of her mother-in-law i.e. deceased Bhadraben, where he found that his brothers-in-law and his wife were standing outside there. The door of the bungalow of the deceased Bhadraben was closed and was locked. As the lights of the bungalow were off, the watchman of that society, Somabhai Ranabhai, was called and the bore operator - Vasantbhai also came there. The watchman switched on the light with the help of a stick through the window grill. One saree was found lying on the drawing room. The complainant and others broken open the lock and entered into the house. The room in the cellar was closed from outside by stopper and from inside, noise of fan was heard. On opening the door of the room in the cellar, the deceased

Bhadraben was found lying dead, her mouth was gagged and diamond ear ring and two gold bangles, which she used to wear, were not seen. Therefore, PW20 informed the Satellite Police Station. On receipt of the information, M. G. Vaghela – Police Inspector came there. He recorded the complaint of PW-20 as per his narrations and sent it for registration. Thereafter, pursuant to registration of the FIR, the investigation was put in motion and the investigating officer called the dogs squad and other equipments. He also held inquest on the dead body of the deceased in presence of the panchas and thereafter, sent the dead body of the deceased to the hospital for autopsy report. The clothes of the deceased were seized from the hospital after drawing a *panchnama* and were sent to the Forensic Science Laboratory for analysis. A *panchnama* of the place of occurrence was drawn and blood stains were collected from the place of occurrence. Thereafter, the investigation was handed over to PW26 - Madarsingh Bhimaji Solanki, Police Inspector of City Crime Branch, Ahmedabad, who, on the basis of the evidence collected, has arrested all the three persons on 16th March, 1998 from Lambha Temple under panchnama. During the course of investigation, the muddamal articles, which were looted by the accused, were also recovered from A1 and A3 by drawing the discovery panchnama at the instance of A1 and A3 and thereafter, sent them to the FSL for analysis.

2.2 On completion of the investigation, as sufficient incriminating evidence was found against all the accused, the

Investigating Officer filed charge-sheet in the Court of the learned Judicial Magistrate (First Class), Ahmedabad (Rural) for commission of the offences under Sections 394, 302, 449 and 452 IPC. As the offences punishable under Sections 302 and 394 IPC are exclusively triable by the Court of Sessions, the learned Judicial Magistrate (First Class) committed the case to the Sessions Court, Ahmedabad (Rural).

2.3 The learned Additional Sessions Judge, Ahmedabad (Rural), to whom the case was made over for trial, framed the charge against the accused for commission of offences punishable under Sections 302, 394, 449, 452 read with Section 120B of IPC. The charge was read over and explained to the accused. The accused pleaded not guilty to the charge and claimed to be tried. Therefore, they were put to trial by the learned Additional Sessions Judge, Ahmedabad (Rural) in Sessions Case No.37 of 1999.

2.4 In order to bring home the charge levelled against the accused, the prosecution has examined as many as 26 witnesses and relied upon their oral testimonies. The details of which are detailed in paragraph-11 of the impugned judgment and order, they are as under:

PW	Name	Status	Exh. No.
1	Sunil Prafulchandra Trivedi	Panch Witness	11
2	Amitkumar Dhanubhai	Panch Witness	14

PW	Name	Status	Exh. No.
3	Kiritbhai Navinchandra	Panch Witness	19
4	Snehal Upendrabhai Thaker	Panch Witness	21
5	Rajeshbhai Umeshbhai Shah	Panch Witness	25
6	Ritaben w/o Shripal Gandhi	Witness	26
7	Sanjaybhai Shantilal Shah	Panch Witness	27
8	Kanubhai Govindbhai Rabari	Panch Witness	31
9	Firozkhan Sharifkhan	Panch Witness	36
10	Rajubhai Ishwarbhai Kahar	Panch Witness	38
11	Rajeshbhai Ganeshbhai Kahar	Panch Witness	41
12	Keshabhai Manabhai Parmar	Panch Witness	44
13	Yakubbhai Ibrahimbhai Sheikh	Panch Witness	50
14	Mahendrasinh Vanubha Jhala	Police Constable – Witness	52
15	Govindbhai Motibhai	Jamadar	53
16	Jayantilal Manilal Patel	Circle-Inspector – Witness	57
17	Vinodkumar Dilipbhai Christian	Head Constable – Witness	60
18	Atmaram Parsottam	ASI – Witness	65
19	Maheshbhai Hariprasad Dave	Finger Print Expert – Witness	68
20	Shrikantbhai Chandulal Shah	Complainant	77
21	Bhavesh Prahladbhai Thakker		81
22	Dr. Mayuriben Shantilal Shah		85
23	Nathubha Mohansingh Gadhvi	Head Constable – Witness	89
24	Manoharsinh Gulabsinh Vaghela	Police Inspector – Witness	91
25	Dr. Ravindra Shrikrishna Bhinse	Witness	94
26	Madarsingh Bhikhaji Solanki	Police Inspector – Witness	96

2.5 To prove the culpability of the accused, the prosecution has also produced 22 documents and relied upon the contents of the same, the details of which are mentioned in paragraph-12 of the impugned judgment and order. They are as under:

Sr. No.	Particulars	Exh. No
1	Panchnama of the muddamal disclosed by Accused No.1.	12
2	Inquest Panchnama.	15
3	Slip of muddamal signed by the *panchas*.	16
4	Panchnama of the articles seized from the scene of occurrence.	17
5	Chits containing signatures of panchas.	18
6	Panchnama of muddamal disclosed by Accused No.3.	20
7	Panchnama of seizure of photograph of deceased Bhadraben.	22
8	Panchnama of breaking open the lock.	30
9	Panchnama of seizure of clothes of the deceased Bhadraben.	32
10	Panchnama of seizure of plastic button.	37
11	Panchnama of seizure of clothes of accused No.2.	40
12	Panchnama of seizure of clothes of accused No.3.	43
13	Panchnama of seizure of clothes of accused No.1.	46
14	*Yadi* of Investigating Branch.	90
15	Report of the Police Inspector for registering the offence.	92
16	Original complaint.	93
17	Post Mortem Note of the deceased Bhadraben.	95
18	Forwarding Note of the FSL.	97
19	Receipt of the FSL.	98
20	List of muddamal of the FSL.	99

Sr. No.	Particulars	Exh. No
21	FSL Report.	100
22	Report of Serological Department of FSL.	101

2.6 After recording of the evidence of the witnesses was over, the trial court explained to the accused the circumstances appearing against them and recorded their further statement under Section 313 of the Code. In their further statements, they denied the case of the prosecution in its entirety and stated that false case has been filed against them. However, they neither produced any evidence nor did they examine any witness in support of their defence.

2.7 On appreciation, evaluation, analysis and scrutiny of the evidence on record, the trial court has held that A1 and A3 have committed trespass in the house of the deceased Bhadraben with an intention to loot articles and during the course, they have also committed murder of Bhadraben and therefore, the complicity of A1 and A3 in commission of the offences has been duly proved. It, therefore, recorded the order of conviction and sentence against A1 and A3 and passed the order imposing various sentences to which reference has been made in the earlier paragraph of this judgement, which has given rise to both these appeals at the instance of A1 and A3. It may be noted that the trial Court has acquitted accused No.2.

3. Ms. Sadhana Sagar, learned Advocate appointed by the Legal Aid Committee appearing on behalf of the accused, has vehemently assailed the impugned judgment and order by raising the following contentions:

(i) The prosecution has failed to establish the motive of the crime. The prosecution has failed to prove the enmity between the accused and the deceased Bhadraben. There is no direct evidence in the case as nobody has seen the incident of the accused having committed the robbery and murder, with the result the prosecution has relied upon the circumstances to prove its case. Even the circumstances relied upon by the prosecution are not sufficient to establish the guilt of the accused beyond any reasonable doubt. The case mainly hinges upon the so-called circumstances of discovery of the weapon at the instance of the accused themselves, which creates a reasonable doubt.

(ii) Accused No.3 is the servant working in the house of the deceased, therefore, there was no reason for him to commit murder of the deceased Bhadraben for the purpose of looting the articles as he had easy access to the house of the deceased. The evidence in the nature of discovery *panchnama* suffers from serious defects which are fatal to the prosecution and the said *panchnama* cannot be made the sole basis of

conviction.

(iii) The trial Court, without appreciating the evidence on record, has convicted the accused merely on the basis of the discovery *panchnama* and that too, in the offence of murder. The trial Court has not appreciated the principles enunciated by the Supreme Court in the catena of decisions with regard to appreciation of evidence in a case based on the circumstantial evidence. According to her, the circumstances should be of conclusive nature and tendency and they should exclude every possible hypothesis except the one to be proved and there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. In the instant case, there is no chain of evidence that leads to the conclusion that the accused alone has committed the crime.

(iv) It is also asserted by her that the trial Court has misdirected itself in considering the only piece of evidence, that is, discovery *panchnama* and has reached to the erroneous conclusion of recording the conviction and sentence against accused Nos.1 and 3.

(v) On the aforesaid premises, according to her, the impugned

judgement and order of conviction deserves to be quashed and set aside by allowing both these appeals and thereby acquitting the accused of the offences with which they were charged. He, therefore, urges to allow both these appeals .

4. *Per contra* Mr. R. C. Kodekar, learned Additional Public Prosecutor of the respondent-State, has supported the impugned judgement and order of conviction and sentence. According to him, no interference is called for in the impugned judgement and order of conviction and sentence as the trial Court, after considering the entire evidence on record, has come to just and proper conclusions. He, therefore, contended that no case is made out to take a view contrary to the view taken by the trial Court. According to him, it is true that in this case, there is no eye witness to the incident of committing robbery in the house of the deceased and causing her murder. However, the *panchas* of the discovery *panchnama* have categorically deposed that both the accused have shown their willingness to give the clue of the articles looted by them and accordingly, at their instance, a preliminary *panchnama* was drawn and at the time of drawing the preliminary *panchnama*, both the accused have admitted before the *panchas* that they had looted the articles which they had concealed at the place disclosed by them and A3 has also admitted that he had also committed murder of the deceased, and on the basis of the information given by the accused,

the articles were recovered from the place, which was shown by the accused. Therefore, this fact is conclusive proof of the accused having committed the offence of robbery as well as murder. Lastly, according to him, in the case of circumstantial evidence, the articles looted by the accused, which were recovered at their instance, also leads to the conclusion that they have committed murder of the deceased. On the aforesaid premises, according to him, the impugned judgement and order of conviction and sentence does not call for any interference of this Court. Therefore, both the appeals lack merit and deserve to be dismissed. He, therefore, urges to dismiss both the appeals.

5. This Court has considered the submissions advanced by Ms. Sadhana Sagar, learned Advocate appointed by the Legal Aid Committee on behalf of the appellants, and Mr. R. C. Kodekar, learned Additional Public Prosecutor for the State of Gujarat, in both the appeals. This Court has also perused the impugned judgment and order and undertaken complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

6. At the outset, be it stated that so far as the homicidal death of the deceased is concerned, no dispute is raised by the learned Advocate of the accused before this Court. She has admitted that the

deceased has died a homicidal death. However, we have perused the evidence of PW25 – Dr. Ravindra Shrikrishna (Exh.94), who has performed the autopsy on the dead body of the deceased and issued post mortem report at Exh.95. On a conjoint reading of the oral evidence of PW25 – Dr. Ravindra Shrikrishna and autopsy report – Exh.95, it is seen that the deceased has received as many as 15 external injuries and 4 internal injuries and cause of death was due to shock as a result of asphyxia and post mortem findings are suggestive of strangulation and gagging. Therefore, there is no manner of doubt that the deceased Bhadraben died a homicidal death. The trial Court has, therefore, rightly recorded the finding that the deceased has died a homicidal death and we affirm the said finding.

7. It may be noted that the prosecution case against the accused is rested on the circumstantial evidence as there is no eye witness to the incident of killing the deceased Bhadraben as well as robbery committed by the accused in the house of the deceased.

8. It is settled principle of law that in order to sustain conviction on the basis of circumstantial evidence, prosecution must fulfill three conditions:

(i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

(iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the Accused and none else, and it should also be incapable of explanation of any other hypothesis than that of the guilt of the Accused. Further, in cases depending largely upon circumstantial evidence, there is always a danger that the conjecture or suspicion may take the place of legal proof and such suspicion however so strong cannot be allowed to take the place of proof. The Court has to be watchful and ensure that conjectures and suspicions do not take the place of legal proof. The Court must satisfy itself that the various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the Accused.

The above principles are laid down by the Supreme Court in the case of ***Jaharlal Das v. State of Orissa***, reported in ***AIR 1991 SC 1388***.

9. It is also one of the settled principles of law that witnesses may tell lies but not circumstances. The Court must adopt cautious approach for basing conviction on circumstantial evidence. The Supreme Court has reiterated it in the case of ***State of Haryana v. Ved Prakash***,

reported in ***AIR 1994 SC 468***.

10. The Supreme Court, in the case of ***Ramkumar Madhusudan Pathak v. State of Gujarat,*** reported in ***(1998) 7 SCC 702,*** has aptly and elaborately laid down the principles as to which are the circumstances establishing guilt of the accused.

11. The Supreme Court in the very well known case of ***Sharad Birdhichand Sarda v. State of Maharashtra***, reported in ***AIR 1984 SC 1622***, has laid down the following five principles to base conviction on the circumstantial evidence:

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established;

(ii) the facts so established should be consistent only with the hypothesis of the guilt of the Accused, that is to say, they should not be explainable on any other hypothesis except that the Accused is guilty;

(iii) the circumstances should be of a conclusive nature and tendency;

(iv) they should exclude every possible hypothesis except the one to be proved, and

(v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the

innocence of the Accused and must show that in all human probability the act must have been done by the Accused.

12. In the latest decision of the Supreme Court in the case of ***Jaipal v. State of Haryana,*** reported in ***(2003) 1 SCC 169***, it has been held that merely because the accused could have had a motive for causing death of the deceased, it would not by itself be enough to sustain the finding of guilt against him.

13. Keeping in forefront the aforesaid principles clearly elucidated by the Supreme Court, we may now advert to the evidence adduced by the prosecution to find out whether the prosecution has successfully established the chain of evidence to base the conviction on the circumstantial evidence adduced by it with regard to the complicity of accused Nos.1 and 3 in committing the offence of robbery as well as murder of deceased Bhadraben.

14. To prove the case against the accused on the basis of the circumstantial evidence, the prosecution has pitted the following fourteen circumstances against the accused:

(i) The deceased Bhadraben, widow of Jesangbhai Hakamchand, aged 80 years, was staying alone at 20, Shyamal Row-House, Part-II.

(ii) The daughter of the deceased Bhadraben, Smitaben, is staying with her husband – Shrikantbhai Chandulal Shah (complainant) at 96, Shyamal Row-House, Part-I.

(iii) Another daughter of the deceased Bhadraben, Ritaben, is staying with her husband – Shripal Jashwantlal Shah at 137, Manek Baugh Society, near Shreyas Crossing.

(iv) Accused No.3 – Gebji alias Kalu Amraji Mena was working as a servant in the house of the deceased Bhadraben since four years of the occurrence of the incident.

(v) At about 1'o clock in the afternoon on 22nd January, 1998, the daughter of the sister of the mother of Smitaben - wife of the complainant, Guluben alias Rakshaben Jhaveri, who is staying at Bangalore, had come to the house of Bhadraben on 22nd January, 1998 in the afternoon and had stayed till 1'o clock in the afternoon. At that time, accused No.3 – Gebji alias Kalu Amraji Mena was working as a servant at the house of the deceased Bhadraben.

(vi) In between 5:00 and 5:30 in the evening on 24th January, 1998, accused No.3 had come to the house of Smitaben and had

informed that he has come to enquire about the mother as “the house of mother is closed since two days and the outside gate is locked, therefore, whether mother has come to the house or not?” Therefore, Smitaben – wife of the complainant had intimated on telephone about this aspect to her husband – Shrikantbhai Chandulal Shah (complainant) and sister – Ritaben.

(vii) In the evening on 24th January, 1998, the complainant, his wife – Smitaben, Ritaben and her husband – Shripalbhai etc. had come at 20, Shyamal Row House, Part-2 and having broken open the lock, the house was opened, the dead body of Bhadraben was lying in the basement. At that time, there was a gag of shawl in the mouth of the deceased Bhadraben.

(viii) As per the post mortem report at Exh.95, the death of Bhadraben was caused due to shock emerged out of strangulation and post mortem findings were suggesting the death to have been caused by throttling the neck and gagging the mouth.

(ix) On the person of the deceased Bhadraben, there were external as well as internal injuries, as is stated in paragraph-15.

(x) As per the evidence of Shri M. B. Solanki, Police Inspector

of Crime Branch, all the three accused were arrested from the temple of Village: Lambha on 16th March, 1980.

(xi) Accused No.1 had shown willingness to disclose the *muddamal* in the presence of the *panchas* on 16th March, 1998 and having taken the *panchas* and the police party in a Government vehicle near the bus stand of Village: Lambha and having dug a pit near the bushes of babul near the bank of the lake, had taken out one old cloth bag wherein, as stated in paragraph 5, gold and silver ornaments, articles, etc. were there, which were identified by the complainant stating to be belonging to the deceased Bhadraben.

(xii) Accused No.3 had shown willingness to disclose the *muddamal* in the presence of the *panchas* on 19th March, 1998 having taken the *panchas* and the police party in a Government vehicle near one lake on the road leading towards Village: Vejalpur, and having searched for half an hour in the lake, took out one rectangular tin-box and two bundle of keys, out of which there were three keys in one bundle and there were six keys in another. The said articles were also identified by the complainant stating to be belonging to the deceased Bhadraben.

(xiii) The said *muddamal* keys were relating to the locks of the house of the deceased Bhadraben.

(xiv) There was blood of Group 'A' on the clothes which were on the person of the deceased; blood of Group ‘A' was also found on one *muddamal* key .

15. First of all, let us examine as to how the incident is reported to the police. In this connection, we first advert to the evidence of PW20-Shrikant Chandulal Shah (Exh.77), who is the complainant and son in law of the deceased Bhadraben and who lodged the complaint for the alleged incident. He has supported the prosecution case. In his oral testimony, he has, *inter alia*, stated that on 24th January, 1998 at about 5:00 p.m., he received a telephone call from his wife - Smitaben regarding the fact that the servant of her mother came to the house and informed her that the house of Bhadraben is closed for last two days and is locked from outside. The servant also informed that he has come to inquire about the same and Smitaben asked the complainant to come to the house. Accordingly, the complainant came to his house at about 6:00 p.m. and thereafter, went to the house of her mother-in-law i.e. deceased Bhadraben, where he found that his brother-in-law, sister-in-law and the wife were standing outside there. The door of the bungalow of the deceased Bhadraben was closed and was locked. As the lights of the bungalow were off, the watchman of that society, Somabhai Ranabhai, was called and the bore operator - Vasantbhai also came there. The

watchman switched on the light with the help of a stick through the window grill. One saree was found lying on the drawing room. The complainant and others broken open the lock and entered into the house. The room in the cellar was closed from outside by stopper and from inside, noise of fan was heard. On opening the door of the room in the cellar, the deceased Bhadraben was found lying dead, her mouth was gagged and diamond ear ring and two gold bangles, which she used to wear, were not seen. Therefore, he informed the Satellite Police Station. On receipt of the information, M. G. Vaghela – Police Inspector came there, who recorded the complaint as per his narrations and sent it for registration.

16. It may be noted that this witness was cross examined by the learned Advocate of the accused at length and in great detail. Lot many suggestions were put to him that he has wrongly identified the *muddamal*, which was allegedly recovered from accused Nos.1 and 3, and also that at his instigation, the police inspector has wrongly nabbed both the accused. He has repelled all the suggestions and successfully withstood the test of cross examination and nothing could be brought in his cross examination which would impeach the credibility of his evidence or his evidence become doubtful. On the contrary, according to us, his evidence inspires confidence and from his evidence, it has to be held that the deceased Bhadraben died homicidal death in her house and

the ornaments, which were worn by her, as well as the articles from the house of the deceased were looted by the miscreants after entering into the house of the deceased.

17. The prosecution has thereafter examined and relied upon the oral testimony of PW6 – Ritaben Shripalbhai (Exh.26), daughter of the deceased Bhadraben, who has identified the accused persons as well as the jewelery discovered from the accused persons. She has supported the prosecution case. She was also cross examined by the learned Advocate of the accused. From her cross examination also, nothing could be brought, which would impeach the credibility of her evidence. She has unequivocally stated that the accused No.3 was serving at the house of her mother, that is, deceased Bhadraben. In the cross examination, she has also testified that the information that the house of the deceased was closed, was first supplied by accused No.3. The accused No.3 also stated before her that since two days, he was going to the house of the deceased, but, it was closed. From her evidence, it can be assembled that the accused No.3 has deceptively passed on the message to this witness with a view to misguide everyone, including the investigating agency to investigate the case in a wrong direction.

18. On overall reappraisal of the evidence of PW20-Shrikantbhai Chandulal Shah and PW6-Ritaben Shripal, who are close relatives of the

deceased, there is no manner of doubt that the deceased died homicidal death in her own house and it can be gathered that the miscreants, who had come to her house for committing robbery, had looted the gold as well as silver ornaments, which were worn by the deceased and which were lying in the house, and thereafter, committed murder of the deceased.

19. Now, the next question which is required to be answered is that whether accused Nos.1 and 3 entered into the house of the deceased for the purpose of committing robbery. As observed earlier, the prosecution has pitted fourteen circumstances to prove the case against the accused. Out of fourteen circumstances, there is no dispute with regard to first ten circumstances. Out of those circumstances, only 11 to 14 circumstances are required to be proved by the prosecution. In this connection, the prosecution has mainly relied upon the evidence of discovery *panchnama* at the instance of accused Nos.1 and 3 with regard to recovery of jewelleries and keys, which they had looted from the person of the deceased and from her house. The said discovery *panchnamas* are on record at Exhs.12 and 20.

20. In order to prove these circumstances, the prosecution first of all relied upon the evidence of PW1 – Sunil Prafulchandra Trivedi (Exh.11). He has, *inter alia*, testified that on 16th March, 1998, he was

called at the Office of the ACB Crime Branch at Gaekwad Haveli, where accused No.1 was present, who, in his presence, stated that he wanted to show at his will the *muddamal* articles, which were looted. He also stated that one another *panch* – Ranchhodbhai Soni was also present along with him. In his presence, the preliminary *panchnama* was prepared and beneath the same, his signature as well as signature of another *panch* were obtained. Thereafter, he along with another *panch* and members of the police party and the accused went in a car; that the car was driven as per the directions of the accused and they stopped the car near Lambha Village Bus Stand. Thereafter, they went behind the bus stand and near the babul tree, adjacent to the lake, the accused dug a pit and from the pit, he took out an old cloth bag. At that time, the complainant-Shrikant was also present and he identified that this bag belonged to her mother in law – Bhadraben and from the said bag, ornaments were found, which were seized and sealed in presence of the *panchas* and accordingly, second part of the *panchnama* was drawn, which is on record at Exh.12.

21. It may be noted that this witness was cross examined at length and in great detail by the learned Advocate of the accused, but, nothing could be brought from his evidence which would made his evidence unreliable. On the contrary, his evidence is trustworthy and therefore, inspires confidence.

22. On a conjoint reading of the oral testimony of PW1 – Sunil Prafulchandra Trivedi (Exh.11) and the *panchnama* at Exh.12, there is no manner of doubt that this witness has deposed as per the contents of the *panchnama*. He has not exaggerated anything, therefore, it has to be held that in his presence, the accused No.1 has made the statement with regard to showing his willingness to disclose the place where he had concealed the *muddamal* articles looted from the house of the deceased.

23. The prosecution has thereafter examined and relied upon PW3-Kiritbhai Navinchandra (Exh.19) to prove that the accused No.3 had also shown his willingness to disclose the place where he had concealed the *muddamal* keys. PW3-Kiritbhai Navinchandra, in his oral testimony, has stated that on 19th March, 1998, he and another panch – Mukeshbhai Chimanlal Shah were called by the Police Officer of Gaekwad Police Station to act as *panchas*. Accused No.3 – Kalubhai Amraji Mena was present. In his presence, accused No. 3, Kalubhai, had shown his willingness to disclose the place where he had concealed the keys of the house of the deceased Bhadraben. The first part of the *panchnama* was drawn in his presence and beneath the same, his signature as well as signature of the second *panch* were obtained. Thereafter, he along with another *panch* and members of the police party and accused No.3 went in the Government car; the car was driven as per the direction given by the accused No.3. Ultimately, they came to Village

Vejalpur and came near one lake; the accused stated that the articles are in the lake; thereafter, the accused found out one tin box and two bunches of keys from the lake. In one bunch of keys, there were three keys and in the second, there were six keys. The complainant-Shrikantbhai has also identified in their presence that the said keys belonged to the deceased Bhadraben. Therefore, the said keys were seized and sealed by drawing a *panchnama* and accordingly, the second part of the *panchnama* was drawn, which is on record at Exh.20.

24. It may be noted that this witness was cross examined at length and in great detail by the learned Advocate of the accused, but, nothing could be brought from his evidence which would made his evidence unreliable. On the contrary, his evidence is trustworthy and therefore, inspires confidence.

25. On a conjoint reading of the oral testimony of PW3 – Kiritbhai Navinchandra and the *panchnama* at Exh.20, it is seen that the *panch* has deposed as per the *panchnama* and he has not exaggerated anything more and from his evidence, it has to be held that the accused No.3 had made a voluntary statement with regard to concealment of the keys by him, which were looted from the house of the deceased.

26. On reappraisal of the oral evidence of PW1 – Sunil

Prafulchandra Trivedi (Exh.11) and the discovery *panchnama* at Exh.12, and PW3 – Kiritbhai Navinchandra and the discovery panchnama at Exh.20, it has to be held that both accused Nos.1 and 3 had shown their willingness to show the muddamal articles which they had looted from the house of the deceased and on the basis of their willingness, the preliminary *panchnamas* were drawn and the accused had led the *panchas* and the police officer to the place where they had concealed the *muddamal* articles looted from the house of the deceased. According to us, Circumstance Nos.11, 12 and 13 pitted by the prosecution are duly established and the prosecution has successfully proved the said aspect.

27. It is settled principles of law that the sole circumstance in the form of evidence of discovery *panchnama* is sufficient to connect the accused with the alleged crime. In this connection, it would be profitable to refer to the decision of the Privy Council in the case of ***Pulukuri Kottaya and others v. Emperor***, reported in ***AIR 1947 P 67***. In the said case, the Privy Council has held as under:

> "The condition necessary to bring S.27 into operation is that the discovery of a fact must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and

accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate."

28. The Supreme Court, in the case of ***Pandurang Kalu Patil and another v. State of Maharashtra***, reported in ***2002 AIR SCW 366***, has again reiterated the said principle which reads as under:

"The essence of S.27 is that it was enacted as a proviso to the two preceding Sections (see Ss.25 and 26) which imposed a complete ban on the admissibility of any confession made by an accused either to the police or to any one while the accused is in police custody. The object of making a provision in S.27 was to permit a certain portion of the statement made by an accused to a police officer admissible in evidence whether or not such statement is confessional or non-confessional. Nonetheless the ban against admissibility would stand lifted if the statement distinctly related to a discovery of fact. A fact can be discovered by the police (investigating officer) pursuant to an information elicited from the accused if such disclosure was followed by one or more of a variety of causes. Recovery of an object is only one such cause. Recovery, or even production of object by itself need not necessarily result in discovery of a fact. That is why privy council said in AIR 1947 PC 67 that Sit is fallacious to treat the fact discovered in the section as equivalent to the object produced. No doubt, in a given case an object could also be a fact, but discovery of a fact cannot be equated with

> recovery of the object though the latter may help in the final shape of what exactly was the fact discovered pursuant to the information elicited from the accused. The word 'fact' in S.27 of the Evidence Act cannot be disjuncted from the adjoining word 'discovered'. Where statement of accused as recorded in memorandum is I have kept the fire arm concealed behind the old house in a heap of wood, the fact discovered by police officer before whom statement is made is certainly not the gun. The fact discovered is that accused had concealed the gun behind the old house under a heap of wood. It was the same gun with which accused had fired and that aspect has been proved with the help of other evidence."

29. The principles enunciated by the Supreme Court in the above referred to two judgements are squarely applicable to the facts of the instant case. In the instant case also, accused Nos.1 and 3 had shown their willingness to disclose the *muddamal* and keys, which they had concealed and which were recovered by drawing the discovery *panchnama*. Therefore, the information supplied by them at the time of drawing the preliminary *panchnama* is admissible in evidence and on the basis of the said piece of evidence, it has to be held that both the accused have looted the ornaments and also keys, which they had concealed and which they had disclosed and ultimately, recovered.

30. So far as Circumstance No.14 pitted by the prosecution is concerned, the prosecution has relied upon the report of the FSL, which

is on record at Exh.100. On perusal of the FSL Report, it is seen that from the cloth of the deceased, the blood stain, which was found, was having 'A' Group. Similarly, from the keys, which were recovered from accused No.3, were also having the blood stain mark having blood group 'A'. According to us, this conclusive evidence is sufficient to connect the accused with the alleged crime.

31. Now, the next question, which is required to be answered by this Court, is that whether the prosecution has proved that the accused have committed the offence of murder of the deceased Bhadraben also. In this connection, according to the prosecution, the accused have committed robbery and murder in one transaction and since the accused were found in possession of unexplained stolen property, a presumption has to be drawn that the accused have committed both the offences.

32. In the case of ***State of Gujarat vs. Luhar Mahendra Harjivan***, reported in ***1992(2) G.L.R. 1086***, a Division Bench of this Court has held that when the accused is proved to be in recent possession of stolen property, the possession of which is not properly explained, the circumstance is strong enough to connect him with the offence of theft or robbery as the case may be. It is further held that if the offence of murder and robbery are found to have been committed in one transaction and the accused is found to be in recent unexplained

possession of stolen property, the necessary presumption would be that he committed the murder and the robbery both.

33. In the case of ***Gulab Chand vs. State of Madhya Pradesh***, reported in ***AIR 95 SC 1598***, a similar question arose before the Supreme Court. In the said case, the accused had sold some of the ornaments belonging to the deceased immediately on the next day of murder and some of the stolen articles were recovered from the house of the accused at his instance within 3, 4 days of murder and no plausible explanation for lawful possession of the ornaments of the deceased by the accused was given. In the said circumstances, the Supreme Court has ruled that there is a presumption under illustration (a) of Section 114 of the Evidence Act to the effect that the accused not only committed murder but also committed robbery of ornaments as well.

34. The principles laid down by this Court as well as the Supreme Court in above referred to judgements are squarely applicable to the facts of the instant case. At the cost of repetition, be it stated that accused Nos.1 and 3 had shown their willingness to show the *muddamal* ornaments, which they had looted from the house of the deceased and which were recovered at their instance by drawing the discovery *panchnama,* the said articles, which belonged to the deceased, were also identified by the relatives of the deceased. Besides this, accused No.3 has

also admitted while drawing preliminary *panchnama* that in the said transaction, he has also committed murder of the deceased Bhadraben and the said information was found to be true as the *muddamal* articles were recovered at their instance. Besides this, accused No.3 was also serving with the deceased at the relevant time and accused No.1 had visited the house of the deceased prior to the incident for the purpose of repairing the electric fixtures. Therefore, both the accused Nos.1 and 3 were fully aware about the topography of the house of the deceased. Further more, accused No.1 and 3 have not given any plausible explanation of possession of the ornaments, which were recovered by them by drawing the discovery *panchnama* at their instance. Therefore, a presumption has to be drawn that on the fateful day, they entered the house of the deceased, looted the articles and in the same transaction, in doing so, they have committed murder of the deceased.

35. On re-appreciation, re-evaluation, re-analysis and close scrutiny of the evidence, according to us, the circumstances pitted by the prosecution to prove the guilt of the accused, are duly established and all the circumstances unerringly pointing towards the guilt of accused Nos.1 and 3 and the circumstances taken cumulatively form a complete chain that there is no escape from the conclusion that within all probability the crime was committed by the accused Nos. 1 and 3 and none else, and there cannot be another view than the view expressed by the trial Court.

36. We find ourselves in complete agreement with the findings, ultimate conclusion and resultant order of conviction and sentence passed by the trial Court, as according to us, no other finding, conclusion or order except the one reached by the trial Court is possible on the evidence adduced by the prosecution and on the facts and in the circumstances emerging from the record of the case.

37. In the wake of the aforesaid, we do not find any merit in these appeals, therefore, we are not inclined to interfere with the judgment and order of conviction and sentence recorded by the trial Court. The instant appeals lack merit and deserve to be dismissed.

38. For the foregoing reasons, both the appeals fail and accordingly, they are dismissed. The result of which is that the judgment and order dated 01.10.1999 rendered in Sessions Case No. 37 of 1999 by the learned Additional Sessions Judge, Ahmedabad (Rural), convicting and sentencing the accused Nos. 1 and 3 for committing the offences punishable under Sections 394, 302, read with Section 34, and Sections 449 and 452 of IPC, is hereby confirmed and maintained.

39. Muddamal articles to be disposed of as per the directions contained in the impugned judgement and order.

[A. M. Kapadia, J.]

[R. H. Shukla, J.]

*kamlesh**